A

LOH KAH LOON

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
HASAN LAH JCA
AHMAD MAAROP JCA
SULAIMAN DAUD JCA
[CRIMINAL APPEAL NO: J-05-143-2008]

C

19 JANUARY 2011

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Conviction and sentence - Appeal against - Doubt as to identity of drug exhibits - Difference in weight of drug exhibits - Material*

D

discrepancy - Whether there was break in chain of evidence in handling the drug exhibits - Whether judicial commissioner correct in convicting appellant for offence of trafficking - Whether appellant's appeal devoid of merit

E

The appellant was charged for trafficking in 115.54 grams of methamphetamine. The High Court convicted him on the charge of trafficking and sentenced him to death. Hence, this appeal. The appellant argued that there was doubt as to the identity of the drug exhibits. According to the appellant, the drugs in question

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were in two plastic packets (exhs. P7A and P7B). It was the evidence of the investigating officer, PW8, that he weighed both the plastic packets and the gross weight of both these packets were 200 grams while the chemist, PW4, submitted that the nett weight of the crystalline substance in the two packets were

G

214.74 grams, thus the nett weight exceeded the gross weight by 14.74 grams. The appellant contended that by reason of this material discrepancy, the prosecution had not proved its case beyond reasonable doubt.

H

Held (dismissing the appeal; affirming conviction and sentence)

Per Hasan Lah JCA delivering the judgment of the court:

(1) The nett weight of the methamphetamine as stated by the chemist was 115.53 grams, which was 65.54 grams in excess

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of the amount of 50 grams to attract the statutory presumption of trafficking under s. 37(da) of the Act. PW3, the raiding officer, had testified that from the time he took

possession of the drug exhibits at the place of the incident until he handed them over to the investigating officer PW8, the drug exhibits were under his personal custody and control. PW8 testified that he had received the drug exhibits from PW3 at 8.30pm and immediately had marked the two plastic packets and kept them in a locked steel cabinet that only PW8 had access. On 11 January 2003, at about 7.15am, PW8 had taken out the drug exhibits from the steel cabinet, packed them and sent them to the Chemistry Department to PW4 (the chemist). PW8 received the drug exhibits back from PW4 on 11 January 2003 at about 12 noon together with the chemist report (P14). (paras 19-21)

(2) There was no doubt that the drug exhibits recovered by PW3 at the place of the incident were the same drugs that were sent by PW8 to PW4 for analysis and subsequently produced in court as evidence. There was therefore no break in the chain of evidence in relation to the handling of the drug exhibits. This court was in agreement with the finding of the Judicial Commissioner on this issue. (para 23)

(3) The defence of the appellant was difficult to be believed. More importantly, it failed to raise any reasonable doubt in the prosecution's case with regard to *mens rea* possession. The Judicial Commissioner was correct in convicting the appellant for the offence of trafficking in the proscribed drugs. The appellant's appeal was therefore devoid of merit. (para 24)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh mengedar 115.54 gram methamphetamine. Mahkamah Tinggi mensabitkan perayu dengan pertuduhan pengedaran dan perayu dikenakan hukuman mati. Oleh itu, rayuan ini. Perayu berhujah bahawa terdapat keraguan mengenai identiti eksibit dadah. Menurut perayu, dadah-dadah yang dipersoalkan adalah dalam dua bungkusan plastik (eks. P7A dan P7B). Ia adalah keterangan pegawai penyiasat, PW8, bahawa beliau telah mengambil berat kedua-dua bungkusan plastik dan berat kasar kedua-dua bungkusan adalah 200 gram manakala ahli kimia, PW4, menyatakan bahawa berat bersih bahan berhablur yang terdapat di dalam kedua-dua bungkusan itu adalah 214.74 gram, oleh itu berat bersih melebihi berat kasar 14.74 gram. Perayu berhujah bahawa oleh kerana terdapat percanggahan material penting, pihak pendakwaan telah gagal membuktikan kes melampaui keraguan munasabah.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)

Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:

(1) Berat bersih methamphetamine seperti yang dinyatakan oleh ahli kimia adalah 115.53 gram, iaitu 65.54 gram lebih dari jumlah 50 gram untuk menarik anggapan statutori pengedaran di bawah s. 37(da) Akta. PW3, pegawai serbuan, telah memberi keterangan bahawa dari masa beliau mengambil milikan eksibit dadah-dadah di tempat kejadian sehingga beliau menyerahkannya kepada pegawai penyiasat PW8, eksibit - eksibit dadah-dadah berada di bawah jagaan dan kawalannya. PW8 memberi keterangan bahawa beliau telah menerima eksibit-eksibit dadah-dadah dari PW3 pada pukul 8.30 malam dan telah lantas menandai kedua-dua bungkusan plastik dan menyimpan mereka dalam kabinet keluli berkunci yang hanya PW8 mempunyai akses. Pada 11 Januari 2003, pada pukul 7.15 pagi, PW8 telah mengeluarkan eksibit-eksibit dadah-dadah tersebut dari kabinet keluli, membungkuskan dan menghantar mereka ke Jabatan Kimia ke PW4 (ahli kimia). PW8 menerima eksibit-eksibit dadah-dadah tersebut dari PW4 pada pukul 12 tengah hari 11 Januari 2003 bersamaan laporan ahli kimia.

(2) Tiada keraguan bahawa eksibit-eksibit dadah-dadah yang dijumpai PW3 di tempat kejadian adalah dadah-dadah yang sama yang telah dihantar oleh PW8 kepada PW4 untuk analisis dan seterusnya dikemukakan di mahkamah sebagai keterangan. Oleh itu tidak terdapat pencelahan dalam rangkaian keterangan berhubungan pengendalian eksibit-eksibit dadah-dadah. Mahkamah ini bersetuju dengan dapatan Pesuruhjaya Kehakiman atas isu ini.

(3) Pembelaan perayu sukar untuk dipercayai. Lebih penting, ia gagal membangkitkan apa-apa keraguan yang munasabah dalam kes pendakwaan berhubungan milikan *mens rea*. Pesuruhjaya Kehakiman betul apabila menyabitkan perayu dengan kesalahan pengedaran dadah-dadah haram tersebut. Oleh itu rayuan perayu langsung tidak bermerit.

Case(s) referred to:

PP v. Loh Kah Loon [2008] 6 CLJ 399 CA ***(refd)***

Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 SC ***(refd)***

Tan Yew Choy v. PP [2009] 4 CLJ 245 FC ***(dist)***

Teoh Hoe Chye v. PP & Another Case [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC ***(refd)***
Yeong Kia Heng lwn. PP [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372 SC ***(refd)***
Yusri Pialmi v. PP [2010] 6 CLJ 878 FC ***(dist)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37(da)

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Tengku Amir Zaki Tengku Abdul Rahman; AG's Chambers

[Appeal from High Court, Johor Bahru; Criminal Trial No: 45-62-2003]

Reported by Suhainah Wahiduddin

JUDGMENT

Hasan Lah JCA:

[1] The appellant was charged for trafficking in 115.54 grams of methamphetamine. At the conclusion of the case for the prosecution the learned judicial commissioner found that the offence of trafficking was not proven and he therefore reduced the charge to one of possession and sentenced the appellant to eight years imprisonment and ten strokes of whipping after the appellant pleaded guilty to the reduced charge.

[2] Dissatisfied, the public prosecutor appealed to the Court of Appeal against that decision. On 5 May 2008 the Court of Appeal allowed the public prosecutor's appeal and ordered the appellant to enter his defence on the original charge. At the end of the defence case the High Court convicted him on the charge of trafficking and sentenced him to death. Hence, this appeal.

[3] On 6 July 2010 we heard and dismissed the appeal. We now give our grounds for the decision.

[4] The case for the prosecution had been fully set out by this court in *PP v. Loh Kah Loon* [2008] 6 CLJ 399. They are as follows:

> [3] The following facts of the case are basically not in dispute. Acting on information received ASP Charun (SP3) and his men in two vehicles went to Taman Desa Jaya, Johor Bahru. Upon arrival there they saw the target car, a white Kancil,

parked by the road side with the driver, subsequently identified as the respondent, being the only occupant. SP3's vehicle stopped near the Kancil and SP3 got out of the car, approached the respondent and identified himself as a police officer. The Kancil suddenly sped off and the two police vehicles gave chase. During the chase SP3 saw, as did SP5, who was driving him, and SP6 in the police van following behind, the respondent throwing something out of the driver's window on the road divider. On SP3's direction through the walkie talkie SP6 recovered that something, a green and while plastic bag P6, which was handed to SP3 when he came back to the spot after the respondent's arrest. P6 was found to only contain two transparent plastic packets of some crystal like substance which, when subsequently analysed by the chemist SP2, was confirmed to contain 115.54g of methamphetamine, the subject of the charge (the drugs). Possession of 50g or more in weight of methamphetamine would trigger the presumption of trafficking under s. 37(da)(xvi) of the DDA.

[5] In his defence the appellant testified that whilst he was driving along Jalan Lembah he suddenly realized that he was being followed by two cars. He got scared and accelerated. One of the vehicles then overtook him, encroached onto his path and blocked him. Four or five male Malays then got out of the car and rushed to his car. The other vehicle, a van which was tailing him earlier on had stopped behind the Kancil.

[6] One of them, who was later identified as PW3, then knocked on the wind-screen of the driver's side of the Kancil. The appellant wound down the glass window. PW3 identified himself. After that the appellant was forced out of the Kancil and was immediately handcuffed. The appellant said he was slapped by PW3 who later asked him about the drugs. The appellant replied he had none. The appellant was then brought into the Proton Wira which had overtaken him earlier and the police party in their vehicle then moved rather slowly as they were looking for something. A short while later the Proton Wira stopped by the road side. Four of the police personnel then went to the road divider where the appellant saw PW3 pick up a green plastic bag. PW3 showed the green plastic bag and its contents to the appellant but the appellant denied knowledge of the plastic bag and its contents.

[7] The appellant had given a cautioned statement (exh. D16) which version was substantially the same as his oral testimony in court.

[8] At the conclusion of the trial the learned judicial commissioner rejected the appellant's defence and held that the appellant had not raised any reasonable doubt on the truth of the prosecution's case on the issue of possession.

[9] In his petition of appeal the appellant had stated a number of grounds of appeal. However, before us, learned counsel for the appellant raised only one point. He argued that there was doubt as to the identity of the drug exhibits and as such it could not be said that the prosecution had proven its case beyond reasonable doubt. It was his contention that the learned judicial commissioner erred in law and in fact in failing to rule that there were doubts as to the identity of the drug exhibits.

[10] According to learned counsel for the appellant the drugs in question were in two plastic packets (exhs. P7A and P7B). It was the evidence of the investigation officer, PW8, that he weighed both the plastic packets and the gross weight of both these packets was 200 grams. According to the evidence of the chemist, PW4, the nett weight of the crystalline substance in the two packets was 214.74 grams. The evidence showed that the nett weight exceeds the gross weight by 14.74 grams.

[11] Learned counsel for the appellant further submitted that no reason had been given by any of the prosecution witnesses with regard to this material discrepancy. PW3, the arresting officer, said he was handed the drug exhibits by PW6 at about 3pm and he handed the drug exhibits to PW8 at about 8.30pm on the same day, which was 5 1/2 hours later. There was no evidence from PW3 where he kept these two packets of the drug exhibits for a period of 5 1/2 hours before they were handed over to PW8. By reason of this material discrepancy learned counsel submitted that the prosecution had not proved its case beyond reasonable doubt. In support of that contention he cited the following cases:

(a) *Yusri Pialmi v. PP* [2010] 6 CLJ 878;

(b) *Tan Yew Choy v. PP* [2009] 4 CLJ 245;

(c) *Shamsuddin Hassan & Anor v. PP* [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428;

A (d) *Teoh Hoe Chye v. PP & Another Case* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386; and

(e) *Yeong Kia Heng lwn. PP* [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372.

B **[12]** The same issue was argued before the learned judicial commissioner. In dismissing the appellant's contention, the learned judicial commissioner held that in view of the facts that the exhibits were properly marked by PW8 there was no doubt that the drug exhibits were not tampered with and that the drug exhibits recovered in this case were the drugs analysed by the chemist (PW4) and subsequently produced by the prosecution in court as evidence. In his judgment the learned judicial commissioner said:

D Sebagai kesimpulan, melihat kepada kesemua keterangan yang relevan berkaitan dengan ekshibit, mahkamah berpuas hati bahawa Eks. P6 yang diambil di pembahagi jalan, Jalan Lembah, Taman Desa Jaya, adalah ekshibit yang sama yang dikemukakan di mahkamah semasa perbicaraan.

E Tambahan pula, berdasarkan keterangan dalam kes ini tidak terdapat perbezaan diskripsi ("there was no discrepancy in the description") berkenaan dadah yang dirampas, dihantar untuk analisis dan seterusnya dikemukakan di mahkamah yang boleh menimbulkan keraguan. Tidak ada apa-apa keterangan yang boleh F dibuat penemuan fakta bahawa dadah tersebut "has been altered, substituted, or contaminated prior to analysis by the chemist, in which it would affect the result of the analysis".

Kegagalan pihak pendakwaan memanggil penjaga stor untuk memberi keterangan, tidak menimbulkan keraguan tentang identiti G dadah kerana pihak pendakwaan telah berjaya menunjukkan bahawa ia "able to account for very vital link in the chain of custody to establish that the drugs seized by the raiding officer is the same drugs tested by the chemist."

Mahkamah menyedari bahawa mana-mana pihak yang H mengemukakan keterangan mengenai "fungible items" seperti dadah dan sampel darah hendaklah seberapa yang praktikal mengemukakan rantaian keterangan penjagaan yang lengkap. Walau bagaimanapun, "testimony from each custodian of fungible evidence, is not prerequisite to establish a chain of custody. The I proof of the chain of custody need not negate all possibility of tampering so long as the party seeking to admit the evidence has

established complete chain of custody at least as far as practicable". Rantaian keterangan mengenai pengendalian dadah terutama sebelum eskhibit itu dihantar untuk dibuat analisis oleh ahli kimia adalah mantap. Rantaian keterangan selepas ekshibit telah dihantar kepada ahli kimia adalah kurang penting. (Lihat antara lain kes-kes, *Su Ah Ping v. PP* [1980] 1 MLJ 175 dan *Gunalan a/l Ramachandran & 2 Ors v. PP (supra)*. Melihat kepada penandaan yang lengkap yang dibuat oleh pegawai penyiasat dalam kes ini terhadap ekshibit dadah yang dirampas, tidak syak lagi bahawa ekshibit itu tidak diganggu dan ekshibit yang dirampas ialah ekshibit yang sama yang dibuat analisa dan seterusnya dikemukakan di mahkamah.

[13] In *Yusri bin Pialmi* the investigating officer, in his evidence, stated that he weighed the cannabis in the two packages and found the total weight to be 1840 grams. According to the chemist the total weight of the cannabis was 1850.21 grams. This means by the time the cannabis reached the chemist there had been an increase in the weight of that cannabis by 10.21 grams.

[14] When the issue was raised in the appeal before the Federal Court, Zulkefli bin Ahmad Makinuddin FCJ had this to say:

... With regard to this discrepancy in the weight of the cannabis there was no explanation given by SP4 or any other witnesses called by the prosecution to justify the increase in the weight. There is no evidence adduced by the prosecution to show that the weighing scale used to weigh the cannabis has not been calibrated and therefore inaccurate. It is also to be noted that SP4 in his evidence did not explain the movement of the cannabis in packages G1 and G2 from the time he received and weighed them on 25.02.2005 until he placed them in a box marked "CL" [Exhibit P3] on 27.2.2005 and sent to the chemist on 28.2.2005. It is our judgment evaluating the prosecution's case in the light of the evidence available there exists a serious doubt as to the identity of the cannabis as a case exhibit. Was it the same item that was seized by SP2?

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In the present case, the appellant has shown there is a discrepancy in that the weight of the cannabis as determined by the chemist exceeded the weight of the cannabis when they were first recovered by the police. This in turn resulted in creating a doubt as to the identity of the cannabis, now the subject matter of the charge. It is trite that this is an element of the offence

A which the prosecution needs to prove. It will therefore follow that the prosecution cannot be said to have proven the offence of trafficking beyond reasonable doubt against the appellant. A reasonable doubt has been created as to whether the cannabis that was recovered by the police that was sent to the chemist for analysis is the same substance that is found to be cannabis and it is in respect of that substance the appellant is charged with trafficking. This Court had in fact earlier decided on this same issue in the case of *Tan Yew Choy v. Public Prosecutor* [2009] 6 AMR 124 wherein it allowed the appeal of the appellant against conviction and sentence in respect of trafficking on the ground that there was a discrepancy in that the nett weight as determined by the chemist exceeded the gross weight of the cannabis when it was first recovered by the police.

We would like to categorically state here that the evidence adduced by the prosecution in the present case showed there is a reasonable defect in the identity of the case exhibit which is the subject matter of the prosecution against the appellant. In a criminal trial an accused person is permitted to take every available opportunity to reveal any defect in the prosecution's case. (See the case of *Yeong Kia Heng lwn. Pendakwa Raya* [1992] 1 MLJ 327). A defect with regard to the identity of the case exhibit in the present case to us is a serious matter. On this ground alone the appellant would succeed in his appeal.

[15] In *Tan Yew Choy*, the chemist testified that the total weight of the cannabis is 224.65 grams. However the raiding officer testified that he weighed the cannabis and found the weight to be 205 grams. P15 (Borang Serah Menyerah) stated the total gross weight of the cannabis to be 205 grams. The investigating officer also confirmed that he weighed the cannabis and the weight obtained by him was 205 grams. Both the raiding officer and the investigating officer used the same weighing scale seized from the appellant's apartment. With regard to the discrepancy in the weight, the only explanation that the raiding officer gave was *inter alia* as follows:

> Perbezaan dalam berat kasar mungkin kerana alat timbang yang tidak ikut kalibirasinya.

[16] In allowing the appellant's appeal Zulkefli Makinuddin FCJ said:

> We are of the view that the above purported explanation given by PW7 cannot be accepted. It is merely speculative for PW7 to say that the weighing scale might not be accurate. It could very well be that the weighing scale was accurate and that probability

cannot be brushed aside. The fact that both PW7 and PW6 used the same weighing scale showed that both the police officers had confidence in the accuracy of the said weighing scale. It is our judgment that the learned trial judge erred in law in not resolving this aspect in favour of the appellant bearing in mind that this is a borderline case where the weight of the cannabis is 224.65 grams and the amount is only 24.65 in excess of the amount of 200 grams to attract the statutory presumption of trafficking under s. 37(da) of the Act. We noted the learned trial judge's response to this discrepancy was that it is not always the case that the weight obtained by the chemist would be less than the weight obtained by the police. The learned trial judge also said that exh. P17 was not calibrated and what is important is the nett weight as stated by the chemist. With respect we find the reasonings given by the learned trial judge are not tenable in the circumstances of the case. The reasons advanced by the learned trial judge are based merely on general statement and not based on evidence. No question was put to the appellant that exh. P17 had not been calibrated and therefore inaccurate. In fact it is our view that it is incumbent upon the prosecution to prove by way of expert evidence that exh. P17 was not calibrated, and therefore unreliable.

We are of the view that if we were to accept the reasons given by the learned trial judge as representing the correct law it means that the identity of the exhibit when it is first recovered is immaterial as ultimately what is important is the weight as determined by the chemist. With respect, this is not the law. In the present case the appellant has shown there is a discrepancy in that the nett weight of the cannabis as determined by the chemist exceeded the gross weight of the cannabis when they were first recovered by the police. It would therefore follow that the prosecution cannot be said to have proven the offence of trafficking beyond reasonable doubt against the appellant. A reasonable doubt has been created as to whether the cannabis that was recovered by the police that was sent to the chemist for analysis is the same substance that is found to be cannabis and it is in respect of that substance that the appellant is charged with trafficking. (See the case of *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551). On this ground alone the appellant would succeed in his appeal.

[17] We had carefully considered the facts in *Yusri bin Pialmi* and *Tan Yew Choy* and we had come to the conclusion that the facts in those two cases were distinguishable with the instant case. In *Yusri bin Pialmi*, as pointed out by Zulkefli bin Ahmad Makinudin FCJ in his judgment, there was no explanation by the

witnesses for the prosecution to justify an increase in the weight. There was no evidence to show that the weighing scale used to weigh the cannabis had not been calibrated and therefore inaccurate. Furthermore, the investigating officer, in his evidence, did not explain the movement of the cannabis from the time he received and weighed them on 25 February 2005 until he placed them in a box on 27 February and sent to the chemist on 28 February 2005.

[18] In *Tan Yew Choy* the total weight of the cannabis given by the chemist was 224.65 grams and that amount was only 24.65 grams in excess of the amount of 200 grams to attract the statutory presumption of trafficking under s. 37(da) of the Act. It is to be observed that the Federal Court had said in its judgment that the learned trial judge erred in law in not resolving the doubt as to the weight of the cannabis in favour of the accused since this was a borderline case.

[19] In the instant case the nett weight of the methamphetamine as stated by the chemist was 115.54 grams, which was 65.54 grams in excess of the amount of 50 grams to attract the statutory presumption of trafficking under s. 37(da) of the Act. Furthermore, it must be noted that the drugs involved in the instant case was methamphetamine and not cannabis.

[20] PW3, the raiding officer testified that from the time he took possession of the drug exhibits at the place of the incident until he handed them over to the investigating officer, PW8, the drug exhibits were under his personal custody and control. When he arrived at his office at the Narcotic Department, he marked the drug exhibits with his signatures and wrote the date of "9 January 2003" on the two plastic packets. PW8, the investigating officer, testified that he received the drug exhibits from PW3 at about 8.30pm. PW8 immediately weighed the drug exhibits and marked them infront of PW3 and the appellant. He marked the two plastic packets as "S1" and "S2". He then kept the exhibits in the steel cabinet which was in his office. The steel cabinet was locked and according to PW8 he was the only one who had an access to the steel cabinet.

[21] On 11 January 2003, at about 7.15am he took out the drug exhibits from the steel cabinet for the purpose of having them photographed at his office. After that he packed them and sent them to the Chemistry Department, Johor. He handed over the

drug exhibits to the chemist, PW4. He received the drug exhibits back from PW4 on 11 January 2003 at about 12 noon together with the chemist report (P14).

[22] The chemist (PW4) testified that he received the drug exhibits on 11 January 2003 at about 10.31am from PW8. The two plastic packets marked "S1" and "S2" contained crystalline substance. The nett weight of the crystalline substance was 214.78 grams. After analysis he found the crystalline substance to contain 115.54 grams of methamphetamine.

[23] Having carefully considered the entire evidence available we were satisfied, on the facts and circumstances of this case, that there was no doubt that the drug exhibits recovered by PW3 at the place of the incident were the same drugs that were sent by PW8 to PW4 for analysis and subsequently produced in court as evidence. There was therefore no break in the chain of evidence in relation to the handling of the drug exhibits. We were therefore in agreement with the finding of the learned judicial commissioner on this issue.

[24] We had considered the defence put up by the appellant and we found that the defence of the appellant was difficult to be believed. More importantly it failed to raise any reasonable doubt in the prosecution's case with regard to *mens rea* possession. We come to the conclusion that the learned judicial commissioner was right in convicting the appellant for the offence of trafficking in the proscribed drugs.

[25] For the above reasons we found the appellant's appeal was devoid of any merit. The appeal was dismissed. The conviction and sentence imposed by the learned judicial commissioner were therefore affirmed.